No. 06-1242

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

KEVIN NIXON AND BRANDON ANCELET,

Petitioners,

v.

BURYL WHEATLEY AND P D GEORGE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition when the Fifth Circuit's order dismissing Petitioners' appeal was based on Petitioners' failure to reserve the right to appeal interlocutory orders in the offer of judgment they accepted pursuant to Federal Rule of Civil Procedure 68.

DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Buryl Wheatley and P D George Company respectfully submit the following disclosure statement:

P D George Company is a member of the ALTANA Chemie Group of Companies. There are no related or subsidiary entities. No parent or publicly-held company owns 10% or more of P D George Company's stock.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Buryl Wheatley ("Wheatley") and P D George Company ("P D George")[1] respectfully submit that the Petition for Writ of Certiorari filed by Petitioners Kevin Nixon and Brandon Ancelet ("Petitioners") should be denied.

INTRODUCTION

Petitioners seek review of an October 27, 2006 order from the Fifth Circuit Court of Appeals ("the Fifth Circuit") granting Respondents' motion to dismiss the appeal. The Fifth Circuit found that Petitioners accepted an offer of judgment pursuant to FED. R. CIV. P. 68 that did not reserve their right to appeal pre-judgment rulings. Consequently, the Fifth Circuit dismissed Petitioners' appeal. Petitioners now seek relief from that order.

Petitioners contend that this case raises important issues regarding the interpretation of Rule 68. Petitioners also claim that the Fifth Circuit's order conflicts with prior decisions from other courts of appeal. Neither contention is correct. Indeed, the Fifth Circuit's order represents a proper, logical application of Rule 68 and the cases that have interpreted it. Like every other circuit, the Fifth Circuit holds that a party that accepts an offer of judgment that does not reserve appellate rights waives the right to challenge interlocutory orders on appeal.

[1] Wheatley and P D George are referred to collectively as "Respondents."

No Circuit court of appeal, however, has adopted Petitioners' erroneous belief that they may preserve their right to appeal simply after accepting an offer of judgment by subsequently notifying the district court that they intend to appeal. Indeed, Rule 68 requires the district court to enter the judgment on which the parties have agreed. Moreover, the First, Third, Fourth, Ninth, Tenth, and Eleventh Circuits have all held that unequivocal consent to judgment precludes an appeal from that judgment.

The issue raised by the Fifth Circuit's order dismissing Petitioners' appeal is quite settled and therefore does not merit this Court's attention. Even if this Court was inclined to address this issue, this case presents no such opportunity because the record affirmatively demonstrates that Petitioners failed to reserve their right to appeal in the offer of judgment that they accepted.

In the end, Petitioners have failed utterly to carry their burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Court should deny the Petition.

STATEMENT OF THE CASE

On January 3, 2003 in Orange, Texas, a truck driven by Wheatley collided with a car driven by Nixon. (Record at 17). Ancelet was a passenger in Nixon's vehicle. (*Id.*). When the accident occurred, Wheatley was allegedly in the course and scope of his employment for P D George. (R. 18). As a result of the collision, Petitioners claimed they suffered severe personal injuries. (*Id.*).

On December 30, 2004, Petitioners sued Wheatley and P D George in the 260th Judicial District Court of Orange County, Texas. (R. 16-19). Respondents, in turn, removed this lawsuit to the Beaumont Division of the United States District Court for the Eastern District of Texas. (R. 8-30). This lawsuit was assigned to District Judge Marcia A. Crone. (R. 31-35).

Petitioners quickly filed a motion to remand. (R. 38-44). In that motion, Petitioners claimed that Respondents failed to promptly send a file-stamped copy of the Notice of Removal to the state court as required by 28 U.S.C. § 1446(d). (R. 40-41). Further, Petitioners contended that Respondents' Notice of Removal was defective because it lacked the written consent of all defendants whom they had served. (R. 38-39). Finally, Petitioners argued that Respondents waived their right to remove by serving discovery while the case was pending in state court. (R. 40-41).

Respondents responded to Petitioners' motion to remand. (R. 45-55). Shortly thereafter, Petitioners filed a supplement to their motion to remand (R. 56-166), to which Respondents also responded. (R. 167-71). After evaluating the parties' briefing, the district court denied Petitioners' motion to remand on March 24, 2005. (R. 172-81). The district court's opinion is published as *Nixon v. Wheatley*, 368 F. Supp. 2d 635 (E.D. Tex. 2005) (Pet. App. at 1a-10a).

The district court denied Petitioners' motion to remand for three reasons. (*Id.* at 5a-10a). First, the district court held that counsel for Respondents "had the authority to remove on their behalf and did so." (*Id.* at 6a). In this case, the same lawyers represent Wheatley and P D

George. (*Id.*). Consequently, "the proper parties joined in the notice of removal." (*Id.*).

Second, the district court ruled that a twenty-two day delay in filing a copy of the Notice of Removal with the state court was "reasonably prompt under the circumstances." (Pet. App. at 8a). The district court noted that most courts have not construed the word "promptly" in section 1446(d)[2] to mean "simultaneously." (*Id.* at 7a-8a). Further, the district court noted that the state court took no action between the time when Respondents filed their Notice of Removal in federal court and when Respondents sent a copy of that pleading to the state court. (*Id.* at 8a). On these facts, the district court found that exercising federal jurisdiction would not thwart the statutory purpose of section 1446(d) – to provide notice to the state court. (*Id.*). Consequently, the district court held that Respondents complied with section 1446(d). (*Id.*).

Finally, the district court held that Respondents did not waive the right to remove. (*Id.* at 9a). The district court declared that Respondents had only engaged in minimal discovery before and after removal. (*Id.*). Finding that this case fell within its diversity jurisdiction, the district court denied Petitioners' motion to remand. (*Id.*).

Petitioners filed a motion for reconsideration and/or interlocutory certification under 28 U.S.C. § 1292(b). (R. 182-92). The district court denied that motion. (Pet. App. at 11a). Petitioners then filed a petition for writ of mandamus, which the Fifth Circuit quickly denied. (*Id.* at 12a).

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[2] All references to section 1446(d) refer to 28 U.S.C. § 1446(d) (2000).

Following this Court's denial of Petitioners' petition for writ of mandamus, the case progressed at the district court level. (R. 315-36). After serving Petitioners with discovery and filing a motion for partial summary judgment (*Id.*), Respondents presented Petitioners with an offer of judgment of $45,000.00. (Pet. App. at 13a-14a). Respondents made this offer of judgment pursuant to Federal Rule of Civil Procedure 68. (*Id.* at 13a). Further, the offer included all of Petitioners' costs and fees then accrued. (*Id.* at 14a).

On November 23, 2005, Petitioners accepted Respondents' offer of judgment in writing. (*Id.* at 15a). Counsel for Petitioners stated that his clients agreed "to take a judgment against P.D. George for the sum of $45,000." (*Id.*). Seven days later, Petitioners filed their notice of acceptance of Defendants' offer of judgment with the district court. (*Id.* at 16a-17a).

Petitioners notified the district court in writing that they had accepted Respondents' joint offer of judgment. (*Id.*). Consequently, Petitioners asked the district court to enter judgment against Respondents for $45,000.00, including costs of court. (*Id.* at 16a). Petitioners, however, also claimed that they reserved the right to appeal any interlocutory orders "merged within the final judgment." (*Id.*).

The district court entered judgment on December 19, 2005. (*Id.* at 18a). This final judgment matches Respondents' offer of judgment. (*Id.*). Additionally, the final judgment states that Petitioners "shall collectively recover $45,000.00 from Defendants Buryl Wheatley and P.D. George Company." (*Id.*).

Petitioners' notice of acceptance states that they reserve their right to appeal any interlocutory orders. (*Id.* at 16a). The final judgment, however, contains no reservation of appellate rights. (*Id.* at 18a). Instead, the final judgment states that "all relief not herein granted is denied." (*Id.*).

On January 13, 2006, Petitioners filed their Notice of Appeal with the Fifth Circuit. (R. 345-61). Petitioners stated that they would again appeal the order denying their motion to remand and the order denying their motion for reconsideration and/or interlocutory certification. (R. 345).

After the Fifth Circuit scheduled the case for oral argument, Respondents filed a motion to dismiss the appeal, to which Petitioners fully responded. The Fifth Circuit first concluded that Respondents' motion to dismiss the appeal would be "carried with the case." Days before oral argument, however, the Fifth Circuit entered an order granting Respondents' motion to dismiss. (Pet. App. at 19a).

Citing its prior opinion in *Ramming v. Natural Gas Pipeline Co. of America*, 390 F.3d 366 (5th Cir. 2004) (per curiam), the Fifth Circuit observed that a party "must reserve its right to appeal prejudgment rulings in the offer of judgment, otherwise no appeals from judgment will be allowed." (Pet. App. at 19a). The Fifth Circuit held that Petitioners' failure to do so "extinguished their right to appeal." (*Id.*). Further, the Fifth Circuit observed that Petitioners' "subsequent statement purporting to reserve this right could not resurrect it." (*Id.*). Consequently, the Fifth Circuit dismissed Petitioners' appeal. (*Id.*).

Petitioners then filed petitions for panel rehearing and for rehearing *en banc*. On December 11, 2006, the Fifth Circuit denied both petitions. (*Id.* at 20a-21a).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Fifth Circuit's order dismissing Petitioners' appeal neither conflicts with a decision of this Court or any Court of Appeals nor implicates a federal question that this Court has not decided. Consequently, Petitioners have failed to meet their burden of showing "compelling reasons" for the Court to grant their Petition. *See* SUP. CT. R. 10.

I. By Accepting An Offer of Judgment That Did Not Reserve Their Right to Challenge Pre-Judgment Rulings, Petitioners Forfeited Their Right to Appeal.

Petitioners aver that they "effectively reserved their right to appeal the order denying their motion to remand." By accepting an offer of judgment that did not reserve their right to appeal, however, Petitioners forfeited their right to appeal the judgment of the district court. Petitioners also waived their right to obtain appellate review from this Court.

Federal Rule of Civil Procedure 68 states that "a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued." FED. R. CIV. P. 68. A defendant may make an offer of judgment to a

plaintiff "[a]t any time more than 10 days before the trial begins." *Id.* The plaintiff, in turn, has ten days to accept or to reject the offer of judgment. *Id.*

If the plaintiff accepts an offer of judgment, "either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment." *Id.* Offers that are not accepted, however, are deemed withdrawn. *Id.* "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." *Id.*

As this Court has often observed, the purpose of Rule 68 is to "encourage settlement and avoid litigation." *Marek v. Chesny*, 473 U.S. 1, 7 (1985). This rule "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success on the merits." *Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451, 455 (5th Cir. 2003) (citation omitted). Because Rule 68's cost-shifting mechanism is automatic, "plaintiffs face serious consequences in either accepting or rejecting a Rule 68 offer." *Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1076 (7th Cir. 1999) (citation omitted).

To determine whether there has been a valid offer and acceptance under Rule 68, district courts apply basic principles of contract law. *Johnson v. Univ. Coll. of the Univ. of Al.*, 706 F.2d 1205, 1209 (11th Cir. 1983). In order for a contract to be formed, there must be an objective manifestation of mutual assent. *E.g., Boorstein v. City of New York*, 107 F.R.D. 31, 34 (S.D.N.Y. 1985). If the offeree substantially alters an offer of judgment or makes a counter-proposal, that offer of judgment is revoked. *United Steelworkers of Am. v. Bell Foundry Co.*, 626 F.2d 139, 141

(9th Cir. 1980). If the offeree accepts the offer of judgment as written, however, a binding contract is formed. *See id.* The parties should file the notice of acceptance and the clerk should enter the agreed-upon judgment. FED. R. CIV. P. 68.

The offer of judgment that was made to Petitioners contained no reservation of the right to appeal the district court's order denying their motion to remand. (Pet. App. at 13a-14a). Rather, Respondents agreed to have a judgment taken against them for $45,000.00. (*Id.*). When Petitioners accepted this offer of judgment, they neither mentioned nor intimated that they wished to take a second appeal of the district court's order denying their motion to remand. (*Id.* at 15a). Indeed, Appellants only stated that they accepted the offer of judgment. (*Id.*).

Seven days after they accepted the offer of judgment, Petitioners informed the district court that they reserved the right to appeal "any interlocutory orders merged within the final judgment." (*Id.* at 16a). Consequently, Appellants sought to alter the terms of the offer of judgment after acceptance. (*Id.*). An offeree, however, cannot modify or revoke the terms of an offer after it has been accepted. *See Ramming*, 390 F.3d at 370 (citation omitted).

"[A] Rule 68 offer has a binding effect when refused as well as when accepted. . . ." *Boorstein*, 107 F.R.D. at 34. Petitioners accepted an offer of judgment that did not reserve their appellate rights. (Pet. App. at 13a-17a). Although Petitioners claim that they properly reserved their rights in their Notice of Acceptance, this argument plainly misconstrues Rule 68.

Once an offer of judgment has been accepted, Rule 68 mandates that the clerk enter judgment and honor the

parties' agreement. FED. R. CIV. P. 68 ("[T]hereupon the clerk shall enter judgment."). Indeed, the clerk "must enter a judgment *accepted by the parties*." *Ramming*, 390 F.3d at 370 (emphasis added).[3] The notice of acceptance cannot modify the terms that the offeree has accepted. *Cf. id.*

The final judgment that the district court entered mirrors the offer of judgment that Petitioners accepted. (Pet. App. at 13a-17a). This final judgment does not grant Petitioners any right to challenge interlocutory orders. (*Id.* at 18a). It also precludes appellate review by this Court.[4]

Where, as here, a party consents to judgment, the act of consent waives that party's right to challenge disputed issues on appeal. *See Nashville, Chattanooga & St. Louis Ry. Co. v. United States*, 113 U.S. 261, 266 (1885) ("[F]rom a decree by consent no appeal lies." (citations omitted)); *see also Swift & Co. v. United States*, 276 U.S. 311, 324 (1928). Accordingly, the appellate court will avoid "considering the merits of the cause." *Nashville, Chattanooga & St. Louis Ry. Co.*, 113 U.S. at 266. Here, there is no express or implied reservation of the right to appeal in the judgment entered by the district court. Rather, Petitioners consented

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[3] Other circuit courts that have considered the issue have held that the district court has no discretion to modify the judgment on which the parties have agreed. *See, e.g., Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991); *Webb v. James*, 147 F.3d 617, 621 (7th Cir. 1998); *Perkins v. U.S. West Comms.*, 138 F.3d 336, 338 (8th Cir. 1998).

[4] Petitioners contend, in passing, that Respondents' offer of judgment was invalid because Wheatley and P D George jointly made it. The Court, however, need not agonize over this argument. Offers of judgment made jointly by multiple defendants to multiple plaintiffs are enforceable under Rule 68. *E.g., Johnston v. Penrod Drilling Co.*, 803 F.2d 867, 869-70 (5th Cir. 1986).

to the judgment that the district court entered. Thus, the Fifth Circuit faithfully followed this Court's precedents by dismissing Petitioners' appeal. Petitioners may not proceed any further on appeal. *See id.*

II. The Record Plainly Shows That Petitioners Accepted Respondents' Offer of Judgment And Consequently Forfeited Their Right to Appeal.

Petitioners hint that they did not consent to the final judgment that the district court entered on December 19, 2005. The record demonstrates, however, that Petitioners gave their full, unequivocal consent to the final judgment. (R. 337-43). Their consent to judgment waives their right to challenge it further.

On November 9, 2005, Respondents sent the offer of judgment to Petitioners. (Pet. App. at 13a-14a). Fourteen days later, Petitioners accepted Respondents' offer. (*Id.* at 15a).[5] Seven days after acceptance, Petitioners filed their notice of acceptance with the district court. (*Id.* at 16a-17a). The notice of acceptance begins with the following two sentences:

> KEVIN NIXON and BRANDON ANCELET, accept the offer of judgment made by Defendants. Plaintiffs timely accepted this offer on Wednesday, November 23, 2005.

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[5] Federal Rule of Civil Procedure 6(a) excludes Saturdays, Sundays, and legal holidays from computation of the ten-day deadline contained in Rule 68. Petitioners accepted Respondents' offer of judgment ten business days after they received it. (R. 340, 343). Consequently, Petitioners timely accepted Respondents' offer of judgment.

(*Id.* at 16a). Moreover, Petitioners asked the Court "to enter judgment for $45,000.00 to include the costs of court." (*Id.*).

One week after Petitioners accepted Respondents' offer of judgment (*Id.* at 15a), Petitioners stated in their notice of acceptance that they reserved the right to challenge interlocutory orders. (*Id.* at 16a). Defendants' offer of judgment, however, does not mention appellate rights. (*Id.* at 13a-14a). Under Rule 68, an offeree cannot modify or revoke the terms of an offer after it has been accepted. *See* FED. R. CIV. P. 68. Rather, the district court must enter the judgment agreed by the parties. *See id.* ("[T]hereupon the clerk shall enter judgment."); *cf. Perkins*, 138 F.3d at 338 ("Rule 68 leaves no discretion in the district court to do anything *other than enter judgment* once an offer of judgment has been accepted." (emphasis added)).

Petitioners unconditionally and unequivocally accepted Respondents' offer of judgment and asked the Court "to enter judgment for $45,000.00 to include the costs of court." (R. 337, 343). The agreed judgment entered by the district court conforms to the offer of judgment extended to Petitioners. (R. 340, 344). As the Fifth Circuit correctly noted, Petitioners simply cannot disavow their written consent to the final judgment of the district court.

III. The Fifth Circuit's Order Dismissing Petitioners' Appeal Does Not Conflict With Opinions From Other Circuit Courts.

Petitioners would have this Court believe that the Fifth Circuit's ruling conflicts with other decisions from other Circuit courts of appeal. This is not the case. Indeed,

the circuit conflict of which Petitioners complain exists only in their own imagination.

a. The Fifth Circuit – Like Every Other Circuit – Holds That Parties Must Reserve The Right to Appeal Pre-Judgment Rulings in the Offer of Judgment.

Every Circuit court of appeal that has considered the issue has held that an express reservation of the right to appeal in a consent judgment[6] or in an offer of judgment avoids waiver of contested issues that had been resolved earlier in the lawsuit. *See BIW Deceived v. Local S6*, 132 F.3d 824, 828 (1st Cir. 1997); *Keefe v. Prudential Prop. & Cas. Ins. Co.*, 203 F.3d 218, 223 (3d Cir. 2000); *Cohen v. Va. Elec. & Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986); *Slaven v. Am. Trading Transp. Co.*, 146 F.3d 1066, 1070 (9th Cir. 1998); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 527 (10th Cir. 1992); *Shores v. Sklar*, 885 F.2d 760, 763 (11th Cir. 1989) (en banc). Similarly, the Fifth Circuit holds that "[a] party must reserve its right to appeal prejudgment rulings in the offer of judgment. . . ." *Ramming*, 390 F.3d at 370. Otherwise, "no appeals from judgment will be allowed." *Id.* (citing *Shores*, 885 F.2d at 760).[7]

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[6] Judgments rendered pursuant to Rule 68 have often been treated as consent judgments. *See Shores*, 885 F.2d at 762.

[7] Petitioners contend in the alternative that even without a reservation of appellate rights, a party may appeal after accepting an offer of judgment under Rule 68. To support this argument, Petitioners rely on *Colonial Penn Insurance Co. v. Coil*, 887 F.2d 1236 (4th Cir. 1989) and *Whittaker v. Associated Credit Services, Inc.*, 946 F.2d 1222 (6th Cir. 1991). Neither case supports Petitioners' arguments. In *Colonial Penn Insurance Co.*, the Fourth Circuit reviewed and then revoked an offer of judgment due to fraud by the offeror. 887 F.2d at 1237. In *Whitaker*, the Sixth Circuit affirmed the district court's

(Continued on following page)

Indeed, the acceptance of a Rule 68 offer of judgment and the subsequent entry of judgment bar parties from appealing interlocutory orders. *Mock*, 971 F.2d at 527.

b. Petitioners Voluntarily Accepted An Offer of Judgment That Did Not Reserve The Right to Appeal Pre-Judgment Rulings.

There is precisely no dispute in the record that the offer of judgment presented to Petitioners did not reserve the right to appeal interlocutory orders. (Pet. App. at 13a-14a). Nor is there any indication in the record that Petitioners reserved the right to appeal pre-judgment rulings when they accepted the offer of judgment. (*Id.* at 15a). Consequently, Petitioners have waived their right to appellate review.

The Fifth Circuit's order granting Respondents' motion to dismiss the appeal constitutes a logical application of Rule 68's fundamental principles. The Court found that Petitioners had wholly failed to reserve their right to appeal pre-judgment rulings in the offer of judgment and in the final judgment. (*Id.* at 19a). Petitioners' subsequent attempt to reserve their right to appeal simply could not resurrect their right to appeal. In turn, Petitioners' failure to preserve their appellate rights precludes review by this Court.

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modification of an offer of judgment that had contained a typographical error. 946 F.2d at 1223. Neither situation exists in this lawsuit. Nor have Petitioners alleged that the offer of judgment was fraudulent or contained a typographical error. Consequently, *Colonial Penn Insurance Co.* and *Whitaker* are inapposite.

Petitioners aver that the Fifth Circuit was "undoubtedly influenced" by its prior decision in *Amstar v. Southern Pacific Transp. Co.*, 607 F.2d 1100 (5th Cir. 1979) (per curiam). In *Amstar*, the Fifth Circuit held that a reservation of the right to appeal in a consent judgment is ineffective. *Id.* Indeed, the Fifth Circuit went on to observe that "the fact that both parties freely consented to the entry of a final judgment precludes an appeal from it." *Id.* (citing *White & Yarborough v. Dailey*, 228 F.2d 836 (5th Cir. 1955) (per curiam)). It is telling, however, that *Amstar* makes no appearance in the Fifth Circuit's order granting Respondents' motion to dismiss. (Pet. App. at 19a). Indeed, the Fifth Circuit did not cite, much less mention, *Amstar* (*Id.*).

Before the Fifth Circuit, Respondents contended that even assuming, *arguendo*, that Petitioners reserved their right to appeal in the offer of judgment, *Amstar* mandated dismissal of the appeal. Nevertheless, the Fifth Circuit never had the occasion to consider *Amstar* because it found that Petitioners did not preserve the right to appeal in the offer of judgment. (*Id.*). To put it simply, the Fifth Circuit had no occasion either to consider or to apply *Amstar*.

In the end, Petitioners have not presented "compelling reasons" for the Court to grant this Petition for a Writ of Certiorari. *See* SUP. CT. R. 10. Petitioners have failed to demonstrate that the Fifth Circuit's order dismissing their appeal conflicts with a decision of this Court or another Court of Appeals. The Fifth Circuit – like every other Circuit – holds that parties must preserve the right to appeal prejudgment rulings in the offer of judgment and in the final judgment. Unless they do so, "no appeals from judgment will be allowed." *Ramming*, 390 F.3d at 366 (citing *Shores*, 885 F.2d at 760).

Petitioners have neither carried nor approached their burden of demonstrating that there are compelling reasons for this Court to grant their Petition. Accordingly, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondents Buryl Wheatley and P D George Company submit that the Court should deny Petitioners' Kevin Nixon and Brandon Ancelet's Petition for Writ of Certiorari.

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